Kilang Beras Ban Eng Thye Sdn Bhd v Yacob bin Noor Mohamed & Anor

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 16-01 OF 1995
MOHD HISHAMUDIN J
21 AUGUST 1997

Labour Law *— Employment — Termination benefits — Employer failed to pay wages on time — Whether employer wilfully breached contract of service — Whether inference of wilful breach of contract was rebutted — Whether employees could terminate employment and were entitled to termination benefits payment — Employment Act 1955 ss 13(2), 15(1) & 19*

The respondents were former employees of the appellant. In April 1994, a dispute arose between the appellant and the respondents as a result of the non-payment by the appellant of the salary of its employees for the month of March 1994. When the salary was not paid by 12 April 1994, the respondents terminated their employment with the appellant company without notice and lodged a claim with the Labour Department for termination benefits and other related claims. The respondents submitted that the appellant had breached s 19 of the Employment Act 1955 ('the Act'), according to which the employees' salaries should have been paid not later than 7 April 1994. However, the appellant argued that the breach was not wilful and that the respondents could not have lawfully terminated the contract without notice, as provided in s 13(2) of the Act. The appellant's second witness gave evidence that the wages were not paid because of some quarrel within the management of the appellant company. This evidence was not supported by the appellant's first witness, a director of the appellant. The labour officer allowed the respondents' claim for termination benefits under regs 3 and 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations'). The appellant appealed.

Held, dismissing the appeal:

Whenever an employer fails to pay wages in accordance with s 19 of the Act, such a breach of condition of a contract is, prima facie, wilful or intentional unless satisfactory evidence to the contrary is given by the employer to rebut the inference. It is no answer to the employer to assert or allege, with the view to disproving the inference that should be made (that the breach was wilful or intentional), that the breach was caused by misunderstandings, friction or quarrels among persons in its organization holding directorships, or managerial or executive posts.

In this case, the appellant had failed to adduce satisfactory evidence to rebut the inference. The evidence of the appellant's second witness did not carry much weight especially since her evidence was not supported by the director of the company. Therefore, the respondents had the right to terminate the contract of service without

notice pursuant to s 13(2) of the Act and were entitled to termination benefits payment as provided for under regs 3 and 4 of the Regulations (see pp 200D–I and 201A–D). A

[Bahasa Malaysia summary

Penentang-penentang merupakan bekas pekerja perayu. Pada bulan April 1994, suatu pertikaian telah timbul di antara perayu dan penentang-penentang akibat bayaran gaji yang tidak dibuat oleh perayu kepada para pekerjanya untuk bulan Mac 1994. Apabila gaji tidak dibayar pada 12 April 1994, penentang-penentang memberhentikan penggajian mereka dengan syarikat perayu tanpa notis dan mengemukakan satu aduan dengan Jabatan Buruh untuk faedah pemberhentian dan tuntutan berkaitan yang lain. Penentang-penentang menghujahkan bahawa perayu telah melanggar s 19 Akta Pekerjaan 1955 ('Akta tersebut'), menurut mana gaji pekerja sepatutnya dibayar tidak lewat daripada 7 April 1994. Namun demikian, perayu menghujahkan bahawa kemungkiran tidak disengajakan dan bahawa penentang-penentang tidak mungkin boleh menamatkan kontrak dengan sah tanpa notis, seperti yang diperuntukkan oleh s 13(2) Akta tersebut. Saksi kedua memberi keterangan bahawa gaji tidak dibayar kerana berlakunya perkelahian di dalam pihak pengurusan syarikat perayu. Keterangan ini tidak disokong oleh saksi pertama perayu, seorang pengarah perayu. Pegawai buruh membenarkan tuntutan penentang-penentang untuk faedah pemberhentian di bawah peraturan-peraturan 3 dan 4 Peraturan-Peraturan (Faedah Pemberhentian dan Pemberhentian Kerja Sementara) Pekerjaan 1980 ('Peraturan tersebut'). Perayu membuat rayuan. B C D E F

Diputuskan, menolak rayuan:

Apabila majikan gagal membayar gaji menurut s 19 Akta tersebut, kemungkiran syarat kontrak demikian adalah, prima facie, disengajakan melainkan keterangan bertentangan yang memuaskan diberikan oleh majikan untuk mematahkan inferens. Majikan tidak boleh menegaskan atau mengatakan, dengan tujuan mematahkan inferens yang patut dibuat (bahawa kemungkiran adalah disengajakan), bahawa kemungkiran disebabkan oleh salah faham, perselisihan atau pergaduhan di antara orang dalam organisasinya yang memegang jawatan pengarah, pengurusan atau eksekutif. G H

Dalam kes ini, perayu telah gagal mengemukakan keterangan yang memuaskan bagi mematahkan inferens. Keterangan saksi kedua perayu tidak berapa kukuh terutamanya apabila keterangannya tidak disokong oleh pengarah syarikat. Dengan itu, penentang-penentang mempunyai hak menamatkan kontrak perkhidmatan tanpa notis menurut s 13(2) Akta tersebut dan berhak mendapatkan bayaran faedah pemberhentian seperti yang diperuntukkan di bawah peraturan-peraturan 3 dan 4 Peraturan tersebut (lihat ms 200D–I dan 201A–D).] I

Notes

For cases on termination benefits, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 782–787.

Legislation referred to

Employment Act 1955 ss 13(2), 15(1), 19
Employment (Termination and Lay-Off Benefits) Regulations 1980 regs 3, 4

George John (*George John & Co*) for the appellant.
Adi Satria (*Ahmad Farid & Associates*) for the respondents.

Cur Adv Vult

Mohd Hishamudin J: This is an appeal against the decision of the Labour Officer, Alor Setar who had, on 16 January 1995, at the conclusion of an inquiry held by him pursuant to Pt XV of the Employment Act 1955 ('the Act'), ruled that the two respondents — former employees of the appellant were entitled to be paid termination benefits under regs 3 and 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations').

Regulations 3 and 4 of the Regulations stipulate:

3 General provisions for the entitlement of employees to termination or lay-off benefits payment

(1) Subject to these Regulations, an employer shall be liable to pay termination or lay-off benefits payment calculated in accordance with reg 6 to an employee who has been employed under a continuous contract of service for a period of not less than 12 months ending with the relevant date if —

(a) the contract of service of the employee is terminated; or

(b) the employee is laid-off within the meaning of reg 5.

(2) For the purpose of this regulation a continuous contract of service for a period of not less than 12 months shall include in the aggregate if the intervening period or periods between one period of employment and another does not in the aggregate exceed 30 days.

4 Termination

(1) Subject to paras (2), (3) and (4), an employee shall be entitled to termination benefits payment where his contract of service is terminated for any reason whatsoever otherwise than —

(a) by the employer, upon the employee attaining the age of retirement, if the contract of service contains a stipulation in that behalf; or

(b) by the employer, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, after due inquiry; or

(c) voluntarily by the employee, other than under s 13(2) or for the reasons specified in s 14(3) of the Act.

(2) An employee shall not be entitled to any termination benefits payment if —

(a) his contract of service is renewed, or he is re-engaged by the same employer under a new contract of service on terms and conditions which are not less favourable; and

(b) the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract:

Provided that the period of employment immediately prior to such renewal or re-engagement shall be taken into account for the purpose of determining the amount of termination or lay-off benefits payment payable to an employee.

(3) An employee shall not be entitled to any termination benefits payment if, not less than seven days before the date with effect from which his services are to be terminated, the employer has offered to renew his contract of service or to re-engage him under a new contract, so that —

(a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not be less favourable than the corresponding provisions of the contract as in force immediately before the termination of his services; and

(b) the renewal or re-engagement would take effect on or before the date, with effect from which his services are to be terminated, and the employee has unreasonably refused that offer.

(4) An employee shall not be entitled to any termination benefits payment where he leaves the service of his employer before the expiration of any notice given to him by his employer in accordance with s 12 of the Ordinance —

(a) without the prior consent of the employer, which consent shall not be unreasonably withheld; or

(b) without having made payment to the employer in accordance with s 13.

The dispute between the appellant and the respondents regarding termination benefits payment began in early April 1994 with the non-payment by the appellant of the salary of its employees for the month of March 1994. According to s 19 of the Act, the salary for the month of March had to be paid latest by 7 April. This section stipulates:

Time of payment of wages

Every employer shall pay to each of his employees not later than the seventh day after the last day of any wage period the wages, less lawful deductions, earned by such employee during such wage period:

Provided that if the Director General is satisfied that payment within such time is not reasonably practicable, he may, on the application of the employer, extend the time of payment by such number of days as he thinks fit.

When the salary was not paid by 12 April (the appellant did not apply for any extension of time), the respondents and 12 other employees terminated their employment with the appellant company and lodged a claim with the

A Labour Department for termination benefits and other related claims. The termination was without notice. The Labour Officer fixed 30 May 1994 as the date of the hearing of the inquiry. In the meantime, on 24 April, the company announced that the March salary would be paid and this induced the other 12 employees to abandon their claim and to return to work with
B the appellant. The two respondents, however, refused to return and they proceeded with their claim. Before the Labour Officer, they succeeded in their claim for termination benefits.

The only issue in this appeal is purely on the question of whether the Labour Officer was right in awarding termination benefits payment to the
C respondents.

Encik George John, learned counsel for the appellant, submitted that the respondents were not entitled to termination benefits because the purported termination by them was unlawful. He argued that the purported termination was unlawful because, although, admittedly, there had been a breach of s 19 of the Act (and consequentially, by operation of law a
D breach of the contract of employment) by the appellant, by reason of the non-payment of salary by 7 April, nonetheless, the breach was not a wilful breach and thus the respondents could not have lawfully terminated the contract under s 13(2) of the Act. The learned counsel argued that there was no wilful breach because there was only a delay in the payment of
E salaries and that the other employees who stayed on with the company were eventually paid their salary on 28 April. Learned counsel explained that the delay was not intentional but was due to the fact that there were some quarrel within the management. The learned counsel contended that the fact that there was some quarrel within the management of the company was borne out by the evidence of the appellant's second witness, Yong Loo
F Booi, who was employed as a cashier with the company. This witness had said:

> Kami hanya ambilalih pada 23 April 1994. Sebelum tarikh itu, gaji tidak dibayar disebabkan saya sebagai juruwang sahaja dan pengurus tidak memberi wang untuk bayaran. Sebelum itu, baucar dikeluarkan oleh kerani. Ya,
G baucar ada dibuat selama ini tetapi disebabkan kacau antara pengurusan, maka tidak boleh dibayar.

With respect, for the reasons which I shall now give, I cannot accept learned counsel's submission.

I shall first touch on s 13(2) of the Act. This provision states:

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> Termination of contract without notice
>
> (2) Either party to a contract of service may terminate such contract of service without notice in the event of any *wilful* breach by the other party of a condition of the contract of service. (Emphasis added.)

I In the present case, it is to my mind clear (indeed, it is not denied by the appellant) that there had been a breach of the provision regarding payment of wages (s 19) by the appellant. But it is to be observed that s 13(2) of the Act speaks of a breach of a condition of the contract of service. However, a breach of s 19 is not merely a breach of the condition of the contract of

service. It is more than that — by the operation of s 15(1) of the Act — such a breach is also deemed to be a breach of the contract of service. Section 15(1) states:

> When contract is deemed to be broken by employer and employee
>
> (1) An employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Pt III [which includes s 19].

However, the contention by learned counsel for the appellant is that, as I have stated just now, although there was a breach of the condition of service, this breach of s 19 of the Act was not wilful; it was not intentional.

Now, the Act does not define 'wilful'. But in *Jowitt's Dictionary of English Law* Vol 2 (2nd Ed (1977), Sweet & Maxwell), the term is defined as follows:

> Wilful — intentional or deliberate.

It is my judgment that whenever an employer fails to pay wages in accordance with s 19 of the Act, such a breach of condition of a contract (which is also a breach of the Act) is, I think, prima facie wilful or intentional. In other words, there is nothing more for the employee to do in order to prove that the breach was wilful — once the employee has proved the breach, the court shall infer that the breach was wilful or intentional, unless satisfactory evidence to the contrary is given by the employer to rebut the inference.

It therefore follows that on the evidence, the issue is: Is there any satisfactory evidence to disprove the inference, that is to say, to show to the court that, on a balance of probabilities, the breach was not intentional? Taking the evidence of the appellant as a whole, I am not inclined to accept the evidence of its second witness as carrying much weight. This is because, first, she was only a cashier in the company; she was not at the management level of the company. Second, the above evidence given by her regarding the cause of the non-payment of salary was given only during cross-examination by the counsel for the claimants (the respondents in this appeal). No evidence was given by her during examination-in-chief regarding the alleged quarrel. Third, she did not elaborate in her evidence as to what she meant by 'kacau antara pengurusan'. Fourth, her evidence was not supported by the evidence of the appellant's first witness, Yong Oon Kong, who was a director of the company, and who testified to the contrary:

> Tidak, saya tidak katakan bahawa gaji mereka tidak akan dibayar oleh kerana ada perbalahan dalam urusan kilang.

This first witness was the director of the company and, unlike the cashier (the second witness), was in a position to explain at the inquiry as to the actual reason for non-payment. Yet, it is remarkable that this witness, after making the above denial, did not consider it necessary to go on to explain in his evidence as to the actual cause of the non-payment.

In any case, in my opinion, once it is proved or shown by an employee/claimant that there had been a breach of s 19 of the Act, it is no

answer to the employer to assert or allege, with the view to disproving the inference that should be made (that the breach was wilful or intentional), that the breach was caused by misunderstandings, friction or quarrels among persons in its organization holding directorships, or managerial or executive posts.

In conclusion, I hold:

(a) that by reason of the breach of s 19 of the Act itself, there was, prima facie, a wilful breach of a condition of the contract of service on the part of the appellant;

(b) that by reason of (a) above, the appellant is deemed by s 15(2) of the Act to have committed a breach of the contract of service;

(c) that the appellant had failed to adduce satisfactory evidence to rebut the inference (or prima facie case) of wilful breach;

(d) that the respondents had the right to terminate the contract of service without notice pursuant to s 13(2) of the Act; and

(e) that the respondents were entitled to termination benefits payment as provided for under regs 3 and 4 of the Regulations.

I therefore dismiss this appeal with costs.

Appeal dismissed.

Reported by David Lai